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STATE FOR EEB/IP (BOLGER, URBAN)
STATE PASS USTR (WILSON)
STATE PASS COMMERCE (ITA - DCALVERT)
STATE PASS USTPTO (MSHAPIRO)
STATE PASS U.S. COPYRIGHT OFFICE (MSKELTON)

E.O. 12958: N/A

TAGS: ECON ETRD KIPR SP

SUBJECT: SPECIAL 301 SPAIN RECOMMENDATION

REF: (A) MADRID 00137 (B) STATE 09475 (C) 07 MADRID
02305 (D) STATE 158938 (E) STATE 56080 (F)
STATE 30128 (G) 07 MADRID 02128

¶1. (U) This cable is sensitive but unclassified. It is not repeat not for internet distribution.

¶2. (SBU) Summary: Embassy requests Washington agencies to consider an out-of-cycle review for Spain in October 2008. On March 9, parliamentary elections will be held in Spain and a new government will assume office in April. Even if the ruling PSOE is re-elected, we expect significant changes among officials responsible for IPR policy. We propose to tell the new government that Spain will appear on the Watch List if it does not do three things by October 2008. First, issue a GOS announcement stating that internet piracy is illegal, and that the copyright levy system does not compensate creators for copyrighted material acquired through peer-to-peer file sharing. Second, amend the 2006 "Circular" that is widely interpreted in Spain as saying that peer-to-peer file sharing is legal. Third, announce that the GOS will adopt measures along the lines of the French and/or UK proposals aimed at curbing internet piracy by the summer of 2009. As this message documents, the Embassy recognizes that the lack of sufficient Spanish progress during the past year could justify Spanish placement on the Watch List. Our out-of-cycle request is made with the view that proceeding in this way be more likely to result in constructive action by the new government. End Summary.

SPANISH ACTIONS WITH
RESPECT TO THE SPAIN
SPECIAL 301 INITIATIVE

¶3. (SBU) While the Spanish government has been very receptive to technical advice from the USG (for instance in connection with its November 2007 Madrid IPR conference) on Internet Service Provider (ISP) liability issues, there has been no "meaningful action to update and improve Spain's e-commerce laws." Workable notice and takedown procedures have not been established. The "actual knowledge" standard demanded prior to requiring ISPs to remove illicit content from the internet remains operative. About a year ago, the government had proposed an amendment (Article 17 bis) to the Information Society Law which would have created a fairly robust notice system and an embryonic takedown procedure. The copyright-based industries approved of Article 17 bis. However, the Council of State rejected Article 17 bis on procedural grounds. The government did not subsequently try to resuscitate Article 17 bis because of very public opposition from Spain's internet surfer community (represented by the "Asociacion Internauta", which is headed by Victor Domingo). We suspect that Spain's Internet Service

Providers (ISPs) were also pleased to see Article 17 bis die.

Subsequently, the GOS revived the Ministry of Industry, Tourism and Trade and Ministry of Culture led working group for ISPs and content providers to see if some other solution could be found. The government has convoked several meetings during the year. Our content industry contacts tell us that the proposals that have been discussed in this working group have been significantly less ambitious than Article 17 bis. They are looking for leadership from the GOS similar to the leadership displayed by the French and UK governments with respect to notice and takedown. The copyright-based industries, which have been participating in these working group meetings for three years, say that, at some point, the government needs to pressure the ISPs to accept a great degree of responsibility for curbing piracy on the internet. In their judgment this has not happened so far. Our evaluation is that the copyright-based industries' perception is correct.

¶4. (SBU) The GOS has not established a working group to consider the feasibility of administrative sanctions for illegal internet downloads, although officials at the Ministries of Industry and Culture have considered the possibility.

¶5. (SBU) We see no evidence of greater centralized coordination of internet piracy investigations. However, local trade associations do not complain about the lack of centralization of police investigations into internet piracy.

In fact, as in years past, local trade associations continue to praise the efforts of the police to combat both internet and street piracy. The issue remains that the judiciary does not issue deterrent-level sentences.

¶6. (SBU) The Fiscalia General's official instruction which conveys the impression that peer-to-peer downloading is not a crime remains operative. However, on 2/7/08, when the DCM met with Spanish Secretary of State for Justice, Julio Perez-Hernandez (Deputy Justice Minister equivalent), he committed to comment in writing on this topic by 2/21/08 (ref A). He appeared to be unaware of the uproar that this Circular has generated. Also, the Teniente Fiscal del Tribunal Supremo (Deputy Fiscal General equivalent) appeared to be receptive to discussing the Circular during a 2/13/08 colloquium with visiting U.S. Patent and Trademark Office Senior Counsel Michael Shapiro. Government officials insist in meetings with Embassy officials that the Circular does not legalize peer-to-peer file sharing, and technically they are no doubt correct. The reality is though that during 2007 the public perception that the Circular decriminalizes peer-to-peer file sharing and downloading has continued to grow. The normally pro-government daily, El Pais, wrote about this in a January 12, 2008 article entitled: "About Internet Downloads." The article says that "peer-to-peer internet downloads are completely legal here." The article quotes lawyer Carlos Sanchez Almeida, who notes that there is not a single conviction against anybody for having conducted illegal downloads (Note: In fairness this is probably true for most EU Member States.) The problem though as the El Pais article points out is that Spain's internet surfing community constantly refers to the Circular to justify its conduct, and the "internautas" are not contradicted by government officials.

¶7. (SBU) A related problem with respect to peer-to-peer file sharing is the widespread view in Spain that the copyright levy system compensates for illegal internet downloads. During the November 7-8, 2007 GOS-organized Madrid IPR conference, a senior Ministry of Industry, Tourism and Trade official, Juan Junquera Temprano, specifically said that the copyright levy system does not constitute compensation for peer-to-peer file sharing. Other GOS officials have said this as well. But, this message has not been internalized by Spanish society. The background is that Spanish law (like many other continental European legal systems) permits "private copies" to be made from legally acquired copyrighted products. Copies obtained through peer-to-peer file sharing

are by definition not covered by the private copy exception because they are not legally acquired. But this distinction is lost on most Spaniards. (Comment: Copyright levies are, in fact, not popular in Spain. The opposition conservative PP party has promised to abolish copyright levies if it wins the March 9, 2008 parliamentary elections. On balance, our copyright interests would probably be better served were Spain to abolish copyright levies as they constitute a distraction to our efforts to seeing creators being properly compensated. But given the private copy exception, which is a strongly established element in Spanish jurisprudence, Spain is likely to maintain a levy system for a number of years to come even if the PP wins the elections.)

¶8. (SBU) An agreement between the government and the Spanish Restaurant and Bar Association to post notices stating that the making available of pirated CDs and DVDs is illegal has not been concluded. In 2007, the Ministry of Culture sent a letter to the association suggesting such a an accord. We were told by a Ministry of Culture working-level contact that several meetings were held, but in the end they did not yield a result. "Mochileros" (vendors with backpacks) continue to enter into establishments to sell pirated CDs and DVDs. Our copyright-based industry contacts tell us that some local governments such as Barcelona, San Sebastian, and Marbella have made extra efforts against street piracy, which has also had the positive effect of limiting mochilero activity there. With respect to the "concerted action" items discussed in the demarche, we have requested statistics from the Spanish authorities. Street piracy clearly remains a problem in Spain, although the industry trade associations talk about internet piracy much more now than three or four years ago.

INDUSTRY TRADE ASSOCIATION VIEWS

¶9. (SBU) EconOff and visiting USPTO senior counsel, Michael Shapiro, met with Federacion Antipirateria (FAP) President Jose Manuel Tourne on 2/11/08. The FAP represents the movie and videogame industries. The Motion Picture Association of America (MPAA) supports FAP. Tourne recommends placing Spain on the Priority Watchlist. This posture springs in part from declining revenues for the businesses Tourne represents. This is clearest when it comes to DVD rentals. Rentals of DVDs declined 32% in 2007, compared with 2006. In 2003, the companies Tourne represented had a total of euros 413 million in revenues, which have declined to euros 274 million in ¶2007. The FAP President conceded that it is always debatable to what extent declining revenues are attributable to product people are not interested in, and to what extent piracy is responsible. However, given the growth of broadband internet penetration in Spain in the last couple of years, it is reasonable to assume that piracy is responsible for a significant part of the declining revenues. In June 2007, there were almost 5.9 million high-speed internet lines installed in Spain, representing a 28.7% increase over a period of a year. Tourne showed EconOff and Shapiro a widely used website in Spain called Hispavista that is used by many people to download movies. The site is by no means "undercover" in any way. In fact, it looks professional and aboveboard. Beyond strict business concerns, Tourne expressed frustration with the way the government has handled IPR matters over the last four years. The 2004 anti-piracy plan, unveiled with much fanfare, had not generated tangible results beyond a few publicity campaigns. Perhaps his greatest irritation was the GOS-sponsored stakeholder working group on notice and takedown, which he felt had been stacked against content providers. The FAP's priorities included provisions to permit filtering, and an independent authority (along the lines proposed by French President Sarkozy) to issue graduated responses against illegal internet downloaders, and a functioning notice and takedown system for the independent authority to work with. Tourne would like to see the penal code amended to make graduated sanctions against internet violators possible.

¶10. (SBU) EconOff and visiting USPTO senior counsel, Michael

Shapiro, also met with Promusicae President Antonio Guisasola, on 2/11/08. Promusicae represents the music business in Spain and is affiliated with the International Federation of Phonogram Industries (IFPI), which in turn is affiliated with the Recording Industry Association of America (RIAA). Promusicae recommends watchlisting Spain. In 2007, sales of DVDs in Spain declined by 27%, compared with 2006. The legal digital market in Spain remains relatively small. From Promusicae's perspective, the most damning statistic with respect to the digital market is that 80% of the legal market in Spain is for mobile phones, and only 20% regular internet downloads. In other words, in the mobile market, where illegal downloading is not possible, people pay for legal music. In the internet, where illegal possibilities flourish, the market is much less developed. Guisasola says that this 80-20 split between mobile and internet legal music business is most pronounced in Spain, but the Embassy does not have numbers that confirm this assertion. Promusicae's greatest frustration is that the notice and takedown stakeholder working group simply has not agreed upon solutions that address content provider concerns. At some point, and that point was reached some time ago in Guisasola's view, the government has to take the initiative. The music industry representative would like to see the Spanish government adopt a posture similar to that of the French and UK governments.

¶11. (SBU) EconOff discussed Special 301 with General Society of Authors and Editors (SGAE) Corporate Relations Director Pedro Farre on 2/13/08. Farre recommends the watchlist for Spain. SGAE is an almost entirely Spanish entity, although it has a relationship with the MPAA. This organization is Spain's biggest collectors' society and as such is one of the biggest defenders of the copyright levy system. But SGAE is also one of the most vocal critics of the lack of government actions against piracy. In fact, the numbers on piracy that SGAE uses suggest that Spaniards have among the highest rates of internet piracy in the world. The SGAE estimates on internet piracy come from the European Interactive Publicity Association (EIAA). According to EIAA, 58% of Spanish internet users download music and 52% download movies and/or videoclips from the internet. The EIAA says that the average in Europe for these activities is 37% and 20% respectively. We have no way of confirming these estimates, but it is nonetheless noteworthy that SGAE cites these estimates. The SGAE, while a vocal critic of the government on piracy matters, is also something of a pillar of the Spanish establishment. Its most prominent members tend more to the left, which helps explain why the conservative opposition proposes to eliminate the copyright levy system. In fact though, SGAE has become so vocal on the government's lack of action on peer-to-peer piracy that the Ministry of Industry recently excluded SGAE from the working group dealing with internet piracy. This is conceivably a sign that Spain's premier collection society is quite aware that over the medium-term, curbing piracy is likely to be even more important to its members than copyright levies.

¶12. (SBU) EconOff had a conversation with the Business Software Alliance (BSA) representative in Spain, Luis Frutos, on 2/8/08. The BSA is not calling for Spain to be watchlisted. Although software piracy levels in Spain remain high, Frutos explained that the BSA is getting much of the cooperation it wants from Spain's Ministry of Industry, Tourism and Trade. This tracks with information from the Ministry itself; BSA is without a doubt the Ministry's favorite industry organization on these matters. The BSA is primarily interested in ensuring that computer distributors do not sell computers containing pirated software. Apparently the Spanish government is cooperating to ensure that this does not happen. The contrast between BSA's views on Spain and the music and movie trade associations is striking. A 2/7/08 interview in the leading business daily, Expansion, with Microsoft executive Txema Arnedo is illustrative. Arnedo is spearheading a one million euro anti-piracy effort. Currently, the software piracy rate in Spain is 46%, but he believes it can be brought down to 36% fairly quickly. He noted that in 1997 the software piracy

rate in Spain was 75%, but that it was reduced by 25% in three years.

POLICE ACTIONS

¶13. (U) Industry trade associations continue to praise the actions of Spain's national and local police forces. There is no doubt that the police are active. The issue remains the lack of deterrent level sentencing for IPR offenders. We are still in the process of collecting full 2007 statistics. We offer the following, non-exhaustive, statistics for 2007 police activity.

Arrests

245

Confiscated Goods (clothes, shoes, luxury goods, cosmetics, cell phones, toys, electric door openers) 6.5million items

Closed Web Pages

14

Closed recording towers

20

Recorders

160

DVDs

65,000

CDs

45,000

The numbers demonstrate that Spanish authorities are far from passive regarding this problem. But the fact remains that the police interventions alone are not sufficient to deter IPR violations significantly. Many arrested people are held for a short period of time and then released, often to become repeat offenders. The closed web pages are interesting and reflect the police's increasingly sophisticated understanding of the internet. We know from press reports that at least several of the closed web pages trafficked in copyrighted materials, although internet piracy *per se* is not the Spanish police's priority. The Spanish police focus especially on taking down web pages that deal in child pornography.

EMBASSY ACTION ON SPECIAL 301

¶14. (U) Over the past year, the Embassy has used the ref (D) demarche as the basis for our interactions with the Spanish government on IPR matters at both the policy and working levels. The GOS is aware of our specific IPR concerns. On 9/17/07, the Embassy coordinated a Washington-Madrid DVC on internet-related IPR matters, which was well attended by GOS officials. The Embassy also worked with Spanish authorities on their 11/7-8/07 IPR conference in Madrid (ref G). Associate Register of Copyrights David Carson and U.S. Patent and Trademark Office Senior Counsel Michael Shapiro attended that event and also lent their expertise at a U.S.-Spain bilateral (ref G) on 11/7/07, which was headed by DCM Hugo Llorens and Telecommunications Secretary of State Francisco Ros. In connection with the 2/15-18/08 Madrid art show (ARCO), Senior Counsel Michael Shapiro returned to Madrid and conducted conversations on internet related IPR matters at the Ministries of Industry and Culture.

15 (U) The DCM has encouraged the GOS to submit comments on this year's Special 301 process by conducting a 2/5/08 meeting with Ministry of Industry, Tourism and Trade Secretary of State for Telecommunications, Francisco Ros and

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a 2/7/08 meeting with Ministry of Justice Secretary of State Julio Perez Hernandez (ref A). A meeting had also been scheduled for 1/31/08 Ministry of Culture Subsecretary Maria

Dolores Carrion Martin, but Carrion cancelled the day of the appointment because she was ill. The DCM also sent individually tailored letters, including once again, the Special 301 demarche (Ref D. Note: The relevant GOS authorities have received this demarche many times before, but we thought it was worthwhile emphasizing once again that the USG's inter-agency deliberations on Spain will be based largely on this demarche.) The letter to the Secretary of State for Industry emphasized notice and takedown; the letter to the Ministry of Justice the Circular; and the letter to the Ministry of Culture focused on an agreement between the GOS and the Spanish Restaurant and Bar Association on mochilero sales of pirated products.

¶16. (SBU) Secretary of State Ros told DCM that he was "worried" about illegal content on the internet. Once again though he suggested that it was very difficult to distinguish between legal and illegal content on the internet, saying that up to 70% of the content on the internet was generated by users. He said that legislation was not possible now because of the upcoming March 9 elections. Moreover, any action at this point would be hopelessly politicized. He complained, once again, that much of the illegal content on the internet is uploaded outside Spain. Ros agreed that French president Sarkozy's initiative was "very interesting", and he said that continued international conversations on internet piracy were very important. Ros said that changing Spanish consumers' "culture" would be very difficult. He argued that, as in the case of the struggle against illegal drugs, it was more important to go after the supplier, rather than the consumer. He conceded though that Spanish internet users were very heavy consumers of illicit content.

¶17. (SBU) Per ref A, Hernandez told DCM that he was not very familiar with the issues surrounding the 2006 Circular to judges and prosecutors. However, he told DCM that he would provide written comments on the topic by February 21.

¶18. (SBU) The GOS has been put on notice at both senior and working levels regarding our Special 301 concerns. The Ministry of Industry, Tourism and Trade is preparing comments on the issue that will be provided the week of February 25. Like last year, the trade part of the Ministry of Industry, Tourism and Trade, headed by Secretary of State Pedro Mejia, is coordinating the Spanish position. Our sense is that the international trade elements of the Spanish government are most sensitive to a possible watchlisting, which is possibly why they are coordinating the Spanish comment on Special 301. We have not heard what arguments the Spanish government will make. We expect, however, the GOS to argue that it is up to the stakeholders to agree among themselves on how to regulate the internet.

COMMENT

¶19. (SBU) The Embassy recognizes that Spain may qualify for placement on the Watch List. The USG and U.S. stakeholders (and many Spanish stakeholders) have made good faith efforts to work with the Spanish government since it unveiled its anti-piracy plan in 2004. The results so far have not been sufficient. The government has acknowledged the problem, conducted publicity campaigns, conducted dialogues with stakeholders to promote inter-industry agreements, encouraged the police force to continue its good work, and works well with the software industry. Spain abides by its international patent-related commitments. However, we cannot point to a single major success of interest to our music and movie industries. This Embassy has consistently argued that Spanish IPR performance should be analyzed in the context of the other big EU economies. France and the UK are making moves on internet piracy that industry organizations praise. Italy is already on the Watch List. Our sense is that Spain is now closer to Italy, at least with respect to IPR performance of interest to the music and movie industries. Should Washington agencies decide to place Spain on the Watch List in April we would have no difficulties explaining why to our interlocutors.

120. (SBU) Our request to Washington agencies to consider an out-of-cycle review in October is predicated on the electoral timetable and our belief that this may be more likely to result in constructive GOS action. There will be a new government in Spain in April. Ideally, it should not have to be held responsible so soon after assuming office for the lack of action by the previous government. Should the socialists be reelected, there will likely be new governmental players responsible for IPR policy. Should the opposition conservative PP party win, it will certainly ask us why it is being punished for the previous government's lack of action. (Note: Currently the two major parties are in a statistical dead heat according to most polls.) The Embassy has a short, medium and long-term IPR strategy for Spain (ref C). Our experience suggests that we need to put the pressure on whatever government is elected during its first year in office, so the short-term part of the strategy is the most critical piece. On balance, we think we would have a better chance getting a new government to move quickly on a public peer-to-peer announcement, the Circular and measures to stem internet piracy if we do not have to deal immediately with the resistance that could be sparked by placement on the Watch List. Our bottom line: consider giving the new government six months, and if does not perform, put Spain on the Watch List.

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